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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 539

IN RE: INITIATIVE PETITION No. 271,
STATE QUESTION No. 408.

M. A. PRICE, JOHN M. RASBERRY and J. R. HUTCHENS,
Petitioners,
VERSUS
WILLIAM N. CHRISTIAN, Secretary of State of the State of Oklahoma, CITIZENS FOR CONSTITUTIONAL RE-APPORTIONMENT AND BRUCE HICKMAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

WALT ALLEN,
Chickasha, Oklahoma;

JAS. A. RINEHART,
El Reno, Oklahoma;

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In the
Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

IN RE: INITIATIVE PETITION No. 271,
STATE QUESTION No. 408.

M. A. PRICE, JOHN M. RASBERRY and J. R. HUTCHENS,
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VERSUS

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

To the Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

M. A. Price, John M. Rasberry and J. R. Hutchens, petitioners herein, pray that a writ of certiorari issue to review the judgment entered by the Supreme Court of the State of Oklahoma on the 16th day of July, 1962.

OFFICIAL REPORT

The official report of the opinion of the Supreme Court of the State of Oklahoma, herein sought reviewed, appears at 373 P.2d 1017. A copy of said opinion is appended hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma herein sought to be reviewed was dated and filed on the 16th day of July, 1962.

On the 23rd day of July, 1962, the Supreme Court of the State of Oklahoma entered an order denying petitioners' Petition for Rehearing and Motion for Re-reference.

Jurisdiction to review the aforesaid judgment by writ of certiorari is conferred on the Supreme Court of the United States by 28 U.S.C., Sec. 1257.

QUESTIONS PRESENTED

The questions herein presented for review are:

1. Does the judgment of the Supreme Court of the State of Oklahoma in an original action therein (which said Court has determined to be judicial in nature) determining the sufficiency of the number of qualified signers of an initiative petition after intentionally and arbitrarily refusing to hold a hearing thereon deny petitioners due process of law and equal protection of the laws guaranteed by the Constitution of the United States?

2. Have petitioners been deprived of property by virtue of the aforesaid denial of due process of law and of equal protection of the laws which results in the expenditure of funds of the State of Oklahoma (in which said funds petitioners have an equitable ownership) for the holding of an election upon the initiative petition in question?

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following:

United States Constitution, Amendment XIV, Sec. 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws."

Oklahoma Constitution, Article 5, Section 2:

"The first power reserved by the people is the initiative . . . and fifteen per centum of the legal voters shall have the right to propose amendments to the Constitution by petition . . ."

34 Oklahoma Statutes 1961, Sec. 8:

"When a citizen or citizens desire to circulate a petition initiating a proposition of any nature, whether to become a statute law or an amendment to the Constitution, or for the purpose of invoking a referendum upon legislative enactments, such citizen or citizens shall, when such petition is prepared, and before the same is circulated or signed by electors, file a true and exact copy of same in the office of the Secretary of State and, within ninety days after such filing of an initiative petition, the signed copies thereof shall be filed with the Secretary of State, but the signed copies of a referendum petition shall be filed with the Secretary of State within ninety days after the adjournment of the legislature enacting the measure on which the referendum is invoked. Any petition not filed in accordance with this provision shall not be considered. When such original petition is filed in said office it shall be the duty of the Secretary of State to forthwith cause to be published in at least one newspaper of general circulation within the State a notice setting forth the date of such filing. Any citizen of the State may, within ten days, by written notice to the Secretary of State and to the party or parties who filed such petition, protest against the same. The Secretary of State shall then fix a day, not less than ten days

thereafter, at which time he will hear testimony and arguments for and against the sufficiency of such petition. A protest filed by anyone hereunder may, if abandoned by the party filing same, be revived within five days by any other citizen. After such hearing the Secretary of State shall decide whether such petition be in form as required by the statutes, and his decision shall be subject to appeal to the Supreme Court of the State, and such court shall give such cause precedence over all others. Provided, such appeal must be taken within ten days after the decision of the Secretary of State has been made. If the court be at the time adjourned, the Chief Justice shall immediately convene the same for such hearing. It shall be the duty of the appellants to serve notice upon the Secretary of State, in writing, of such an appeal. Whereupon, said Secretary of State shall immediately transmit all papers and documents on file in his office relating to such petition to such court. If the court shall adjudge such petition insufficient, the parties responsible for same shall have the right to correct or amend their petition to conform to the opinion of the court, provided said amendment or change is made within five days. No objection to the sufficiency shall be considered unless the same shall have been made and filed as herein provided."

STATEMENT OF THE CASE

This action was instituted by petitioners filing their Petition on Appeal with the Supreme Court of the State of Oklahoma whereby the question of the sufficiency of Initiative Petition No. 271 was put in issue. The Secretary of State of the State of Oklahoma had certified that the petition contained 219,698 signatures of legal voters of the State.

The Supreme Court of the State of Oklahoma then entered its order (R. 7) referring the case to its referee "for a trial de novo." No report was filed by the referee with the Court.

Thereafter the Court entered its order (R. 15) that "the order of reference be withdrawn and canceled" and ordered briefs submitted on the legal questions "aside and separate and apart from the sufficiency of the number of signers on said petition." Briefs were then submitted and arguments heard upon all questions in issue EXCEPT the sufficiency of the number of signers of the petition. The Court then filed its opinion holding, in Syllabus No 3 "Initiative Petition No. 271, State Question No. 408, reviewed and examined and held sufficient" (R. 16) and stating in the body of the opinion:

> "A review of the entire petition discloses that it is sufficient as to form, sufficient under the law and contains sufficient valid signatures". (R. 20).

The federal question herein sought to be reviewed was then raised by petitioners' Petition for Rehearing and Motion for Re-reference, stating:

> ". . . the opinion rendered herein on the 16th day of July, 1962, operates effectively to deny to the Appellants [Petitioners] due process of law and equal protection of the laws contrary to the provisions of the Constitution of the United States, Amendment XIV and thereby to deprive these Appellants of their liberty and civil right to a fair and impartial hearing upon the sufficiency of the number of qualified signers of the purported initiative petition designated as Initiative Petition No. 271 . . ." (R. 22).

The said Petition for Rehearing further pointed out specifically that the Court had not held a hearing and had no evidence before it upon which to base its findings as to the number of valid signatures on Initiative Petition No. 271 (R. 23); and prayed that that issue be re-referred to the referee "or that other judicial provisions be made" for determination thereof.

The said Petition for Rehearing and Motion for Re-reference was denied (R. 26).

ARGUMENT

There are two basic issues included in the questions presented for review herein. The first is whether the highest court of a state, in an original action judicial in nature, can constitutionally determine a fact question in controversy after intentionally and arbitrarily refusing to hold a hearing at which evidence upon that question could be presented. The second issue is whether the petitioners' right to a judicial determination of the aforesaid fact question (the number of signatures of legal voters appearing on Initiative Petition No. 271) is a right protected by the United States Constitution, Amendment XIV.

Certiorari should be granted herein and these issues decided because of the fundamental importance of the principles involved. Original actions in the courts of last resort have become more and more numerous in recent years in Oklahoma and throughout the United States.

Decisions of this Court, hereinafter cited, have outlined the requirements of due process in the determination of fact questions. However, our research has not disclosed

a decision of this Court applying those principles to the action of a state's highest court which decides questions of fact, in an original judicial action, without any facts officially adduced in the action.

As is shown by the procedure followed in this case, outlined above, the state court apparently adopted the practice of making up its rules as it goes along with regard to fact questions. A decision in this case would serve to eliminate that dangerous practice, one destructive of the very concept of administration of justice and of the judicial process.

The case below was an original action in the Supreme Court of the State of Oklahoma. Although the terms "Appeal" and "Appellants" are used, the case is an original judicial action, tried *de novo,* and not an appeal. *In re Initiative Petition No. 23, State Question No. 38*, 35 Okla. 49, 127 Pac. 862.

It is clear that in order to constitute due process of law, the trier of fact must afford litigants a hearing with the opportunity to present evidence upon the fact question in issue. *Morgan* v. *United States*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129. The Court stated the rule succinctly in *Postal Telegraph Cable Co.* v. *City of Newport, Ky.*, 247 U.S. 464, 38 S. Ct. 566, 62 L. Ed. 1215, "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."

The guarantee of the Fourteenth Amendment is held to be that each litigant be treated in accordance with the "rudiments of fair play." *Morgan* v. *United States, supra,*

p. 7; *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093.

In this case, the Supreme Court of Oklahoma simply did not hold any hearing at all upon the fact question in issue. The case was first referred to a referee. No report was filed by the referee. The reference was then *withdrawn*, briefs were ordered submitted on the *other* issues in the case and then the Court entered its ruling upon the factual question without any evidence before it upon which such ruling could have been based. We submit that the procedure followed in the case clearly does not follow the rudiments of fair play guaranteed by the Fourteenth Amendment.

The Court's refusal to hold a hearing upon the fact question presented was clearly both intentional and arbitrary. The intent is clearly shown by the language used in the order withdrawing and canceling the reference wherein the parties were directed to brief all other questions "aside and separate and apart" from the fact question presented.

That such action was arbitrary hardly can be denied. In each initiative petition case in the Supreme Court of Oklahoma since *In re Initiative Petition No. 23, State Question No. 38, supra*, p. 7, with the sole exception of this case, that Court has held a hearing or hearings upon the question of the sufficiency of the number of signatures upon the petition in question. See *In re Initiative Petition No. 158, State Question No. 229*, 188 Okla. 111, 106 P.2d 786 and *In re Initiative Petition No. 249*, 203 Okla. 438, 222 P.2d 1032.

This is not a case in which the Court decided to change the law, but rather one in which the Court arbitrarily and intentionally chose to decide a question of fact without holding a hearing. The Court thus denied petitioners due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment.

Such action constitutes a denial of equal protection of the laws with the same effect as though the Legislature had passed a statute providing that everyone in petitioners' circumstances, except petitioners, would be entitled to a hearing. As stated in *Truax* v. *Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254:

> "It is beside the point to say that plaintiffs had no vested right in equity relief, and that taking it away does not deprive them of due process of law. If, as is asserted, the granting of equitable remedies falls within the police power, and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause which forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction."

Petitioners are residents and taxpayers of the State of Oklahoma as alleged in their Petition for Rehearing (R. 22). Oklahoma holds that resident taxpayers have an equitable ownership in the funds of the State. *Vette* v. *Childers*, 102 Okla. 140, 228 Pac. 145. The action of the Oklahoma Supreme Court in determining the sufficiency of Initiative Petition No. 271 results in the holding of an election thereon at the State's expense, thereby depleting the State's funds to that extent and thus depriving petitioners of property without due process of law.

Since the rule in Oklahoma establishes petitioners' equitable ownership in the funds of the State, the unauthorized expenditure thereof as a result of the denial of petitioners' federal constitutional rights clearly is a deprivation of their property rights within the meaning of the Fourteenth Amendment.

Petitioners respectfully pray that a writ of certiorari issue herein and that the judgment of the Supreme Court of the State of Oklahoma be reversed.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT BELOW

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In re: Initiative Petition No. 271 State Question No. 408	)	
M. A. Price, John M. Rasberry, J. R. Hutchens and Roy Grimes	)	
Appellants	)	No. 40,043
vs	)	
William N. Christian, Secretary of State of the State of Oklahoma	)	
Appellee	)	

SYLLABUS

1. The submission of Initiative Petition No. 266, State Question No. 397, amending the Constitution as to the reapportionment of the legislature did not prevent the validity of Initiative Petition 271, State Question No. 408, on the ground that it must contain 25 per cent of the legal voters as provided by Art. 5, Sec. 6 of the Oklahoma Constitution as the two initiative petitions involve measures that are substantially different.

2. Initiative Petition No. 271, State Question No. 408 does not violate Art. 24, Sec. 1, of the Oklahoma Constitution which provides that more than one subject cannot be submitted as an amendment to the Constitution.

3. Initiative Petition No. 271, State Question No. 408, reviewed and examined and held sufficient.

* * * * * * *

Original action brought by M. A. Price, John M. Rasberry, J. R. Hutchens and Roy Grimes as protestants and

appellants to review the order of the Secretary of State declaring valid Initiative Petition No. 271, State Question No. 408.

* * * * * * * *

PETITION DECLARED SUFFICIENT

* * * * * * * *

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For Appellee

* * * * * * * *

DAVISON, J.

This proceeding was commenced by M. A. Price, John M. Rasberry, J. R. Hutchens and Roy Grimes as protestants and appellants under the provisions of 34 O.S. 1961, Section 8, to review the order of the Secretary of State declaring valid and sufficient Initiative Petition No. 271, State Question No. 408, which has for its purpose the amendment to the Constitution of Oklahoma relating to reapportionment of the State Legislature. The completed petition was filed with the Secretary of State December 27, 1961. The Secretary of State counted as valid 219,686 signatures. Only 135,472 legal signatures were necessary to validate the petition.

On March 20, 1962, the Secretary of State entered an order finding the petition sufficient. The petition was filed in this Court March 27, 1962, and was referred to a Referee of the Court March 28, 1962. The cause was set by the

Referee for hearing on April 2, 1962, and at the request of the protestants was continued for 30 days, being set for May 2, 1962.

Protestants introduced evidence of certain irregularities affecting approximately 7,000 purported signers. The protestants then asked for a continuance and further continuance was denied by the Referee, whereupon protestants filed a motion for continuance with the Court which motion was set for oral argument on May 28, 1962. The Court denied any further continuances and directed that briefs be filed.

The Court finds that the protestants have failed to make any substantial showing that there could be any probable defect in sufficient signatures to invalidate the petition in so far as the required number of signers is concerned and finds that the petition contains in excess of 135,472 valid signatures, the required number for its sufficiency.

In its order to brief the Court authorized and directed submission of questions pointing out any defects in the petition other than the number of signers required.

Protestants have filed a brief and first argue that Initiative Petition No. 266, State Question 397, which was submitted in 1960 and defeated at a special election prevents the consideration and validity of the present petition because of the provisions of Art. 5, Section 6, of the Constitution of Oklahoma. That provision is as follows:

> "Any measure rejected by the people, through the powers of the initiative and referendum, cannot be again proposed by the initiative within three years thereafter by less than twenty-five per centum of the legal voters."

If it is determined that the two measures are substantially the same there would then be insufficient signatures to

validate the present petition because of the above constitutional limitation.

Protestants rely on Commonwealth ex rel Margiotti, Atty. Gen. v. Lawrence, 326 Pa. 526, 193 A. 46. In Armstrong v. King, 281 Pa. 207, 126 A. 263, the Supreme Court of Pennsylvania in discussing the right to amend the constitution of that state held that no amendment of any nature could be presented within five years. In Commonwealth v. Lawrence, supra, the Supreme Court of Pennsylvania stated that since the amendment involved in Armstrong v. King, supra, and the former amendment involved increased the debt limit of the State of Pennsylvania the opinion was correct in its conclusion; but the Supreme Court modified the rule announced in Armstrong v. King and held that the five year limitation applied only to articles of the constitution similar in nature. Therein the court stated:

> "* * * Thus understood it means that after a particular amendment, or amendments, has been once submitted another like amendment, or one similar in substance, to the same article cannot be proposed within five years. * * *"

The prohibition in the Pennsylvania Constitution and Art. 5, Sec. 6, supra, are different at least in the respect that our constitutional provision is against the resubmission of any measure and is not limited to constitutional provisions alone. We think that "measure" under our Constitution is to be viewed in a different light to that of the Pennsylvania provision. If the measure differs substantially as to form and purpose it is not the same measure Initiative Petition No. 266, supra, had for its purpose a radical change in the provisions of our Constitution as to reapportionment.

Initiative Petition No. 266 differs from the present petition in a number of different details, some of the differ-

ences being, (1) that the former petition guaranteed each county a representative while the present petition does not make such a guarantee; (2) the former petition re-wrote and amended Sections 9, 9(a), 9(b) and 10 of Article 5, while the present petition does not make such amendments; (3) the former petition removed the limit of seven House members per county while the present petition retains the limit of seven members for any one county; (4) the former petition has the effect of creating a larger number of House members than does the present petition; (5) the present petition would create the vehicle for a larger number of Senators being elected while the former petition would limit the Senate to 48 members; (6) the former petition contains more than twice as many words as the present one; (7) the present petition restricts appeals to be perfected only by a qualified elector while under the former petition an appeal could be made by a citizen.

We are of the opinion and hold that the present initiative petition submits to the people a substantially different measure from that submitted by Initiative Petition No. 266, supra, and its submission is not prohibited or governed by Art. 5, Sec. 6, supra, of the Oklahoma Constitution.

Protestants next argue that the submission of the present initiative petition would be unconstitutional under Art. 24, Sec. 1, of the Oklahoma Constitution which provides that not more than one subject may be presented in a proposed amendment to the Constitution. We do not agree. The initiative petition embraces one general subject, the reapportionment of the legislature, as provided by the Constitution of the State of Oklahoma. All the other provisions, such as setting up a committee for its enforcement, are supplemental to the general purpose. No cases in point are cited by protestants on this issue. Reference is made to only two instances in which any other than reappor-

tioning is treated. One is the provision for the committee consisting of the Attorney General, the Secretary of State and the State Treasurer, who shall reapportion under the provisions of the initiative petition and the provision on filing of candidates for legislative offices with the State Election Board instead of the Secretary of the Election Board. These are incidental to the general plan of reapportionment. The petitioners cite State v. Helmer, 169 Minn. 221, 211 N.W. 3. That case involved a restriction placed upon enactments by the legislature and involved an act of the Legislature of Minnesota which changed the law relating to personal property. It is similar to the rule announced in Adams v. Iten Biscuit Co., 63 Okl. 52, 162 P. 938, involving the enactment of the Workmen's Compensation Act. In Rupe v. Shaw, Okl., 286 P.2d 1094, it is stated that this provision of the Constitution is to receive a liberal rather than a narrow or technical construction. It is a cardinal rule that such a restrictive provision shall not be so construed as to hamper and unreasonably restrict legislation. Coe v. State Election Board, 203 Okl. 356, 221 P.2d 774; Cornell v. McAlister, 121 Okl. 285, 249 P. 959. We therefore hold that the present petition submits only one general subject, the reapportionment of the legislature under the Constitution, and does not violate Art. 24, Sec. 1, of the Oklahoma Constitution.

A review of the entire petition discloses that it is sufficient as to form, sufficient under the law and contains sufficient valid signatures.

The petition is therefore declared sufficient.

ORDER WITHDRAWING REFERENCE

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In re: Initiative Petition No. 271 State Question No. 408.	)	
M. A. Price, John M. Rasberry, J. R. Hutchens and Roy Grimes	)	
Appellants	)	No. 40043
vs	)	
William N. Christian, Secretary of State of the State of Oklahoma	)	
Appellee	)	

O R D E R

It appearing to the court that by reason of the action on the application of protestants filed May 9, 1962, it is no longer necessary to determine the sufficiency of the number of names on the initiative petition and it further appearing to the Court that there remains only legal questions presented to the court;

It is therefore the order of the court that the order of reference be withdrawn and canceled, whereupon this court takes judicial notice of the Special Election held on Initiative Petition No. 266, State Question No. 397, and all the proceedings and results of said Special Election and directs the parties to proceed to brief the legal questions aside and separate and apart from the sufficiency of the number of signers on said petition and for that purpose the contestants are given 30 days in which to file a brief and the brief of the petitioners to be filed within 10 days thereafter.

DONE BY ORDER AND DIRECTION OF THE SUPREME COURT IN CONFERENCE this 31st day of May, 1962.

/s/ BEN T. WILLIAMS
Chief Justice

[APPENDIX]

ORDER OF THE SECRETARY OF STATE OF THE STATE OF OKLAHOMA

BEFORE THE SECRETARY OF STATE OF THE STATE OF OKLAHOMA

IN RE: State Question No. 408
Initiative Petition No. 271

ORDER OF THE SECRETARY OF STATE

This matter came on for hearing before the Secretary of State of the State of Oklahoma, on the 20th day of March, 1962, at which hearing the proponents appeared by Norman Reynolds, and his attorney, and the protestants appeared by their attorneys, Leon Hirsh and Paul Johanning.

The Secretary of State finds that said State Question No. 408, Initiative Petition No. 271 was filed in the office of the Secretary of State on December 27, 1961; that said petition purportedly contained 217,698 signatures. That thereafter, and within proper time, a protest as to the sufficiency of said petition was filed by M. A. Price, John M. Rasberry, J. R. Hutchens and Roy Grimes.

That hearings on said protest have been continued from time to time to allow protestants to make an examination of said petition, and after completion of such examination, said protest finally came on for hearing on said 20th day of March, 1962.

After hearing the testimony presented, and arguments of counsel, the matter was submitted to the Secretary of State, whereupon the Secretary of State made an examination of the said petition, the pamphlets comprising said petition, and the signatures therein contained.

Now, therefore, the Secretary of State finds and holds that the protest as to the sufficiency of said petition should be overruled and denied, and the sufficiency of the said petition is hereby sustained.

Dated this 20th day of March, 1962.

/s/ WILLIAM N. CHRISTIAN
Secretary of State of the
State of Oklahoma.

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Respondents.

RESPONSE AND BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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November, 1962.

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M. A. PRICE, JOHN McRASBERRY and J. R. HUTCHENS,
Petitioners,

VERSUS

WILLIAM N. CHRISTIAN, Secretary of State of the State of Oklahoma, CITIZENS FOR CONSTITUTIONAL RE-APPORTIONMENT AND BRUCE HICKMAN,
Respondents.

RESPONSE AND BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

LEGAL AUTHORITIES

Oklahoma Constitution, Art. V, § 1:

"The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature * * *."

34 O. S. 1961 § 8:

"When a citizen or citizens desire to circulate a petition initiating a proposition of any nature * * * such citizen or citizens shall, when such petition is prepared, and before the same is circulated or signed by electors, file a true and exact copy of same in the office of the Secretary of State and, within ninety days after such filing of an initiative petition, the signed copies thereof shall be filed with the Secretary of State * * *. Any petition not filed in accordance with this provision shall not be considered. When such original petition is filed in said office it shall be the duty of the Secretary of State to forthwith cause to be published in at least one newspaper of general circulation within the State a notice setting forth the date of such filing. Any citizen of the State may, within ten days, by written notice to the Secretary of State and to the party or parties who filed such petition, protest against the same. The Secretary of State shall then fix a day, not less than ten days thereafter, at which time he will hear testimony and arguments for and against the sufficiency of such petition. A protest filed by anyone hereunder may, if abandoned by the party filing same, be revived within five days by any other citizen. After such hearing the Secretary of State shall decide whether such petition be in form as required by the statutes, and his decision shall be subject to appeal to the Supreme Court of the State, and such court shall give such cause precedence over all others. Provided, such appeal must be taken within ten days after the decision of the Secretary of State has been made. If the court be at the time adjourned, the Chief Justice shall immediately convene the same for such hearing. It shall be the duty of the appellants to serve notice upon the Secretary of State, in writing, of such an appeal. Whereupon, said Secretary of State shall im-

mediately transmit all papers and documents on file in his office relating to such petition to such court. If the court shall adjudge such petition insufficient, the parties responsible for same shall have the right to correct or amend their petition to conform to the opinion of the court, provided said amendment or change is made within five days. No objection to the sufficiency shall be considered unless the same shall have been made and filed as herein provided."

34 O. S. 1961 § 24:

"The proce[illegible]re herein prescribed (referring to the initiative procedure) is not mandatory, but if substantially followed will be sufficient. * * *"

STATEMENT OF THE CASE

"This proceeding was commenced by M. A. Price, John M. Rasberry, J. R. Hutchens and Roy Grimes as protestants and appellants under the provisions of 34 O. S. 1961, § 8, to review the order of the Secretary of State declaring valid and sufficient Initiative Petition No. 271, State Question No. 408, which has for its purpose the amendment to the Constitution of Oklahoma relating to reapportionment of the State Legislature. The completed petition was filed with the Secretary of State December 27, 1961. The Secretary of State counted as valid 219,686 signatures. Only 135,472 legal signatures were necessary to validate the petition.

"On March 20, 1962, the Secretary of State entered an order finding the petition sufficient. The petition was filed in this Court March 27, 1962, and was referred to a Referee of the Court March 28, 1962. The cause was set by the Referee for hearing on April 2, 1962, and at the request of the protestants was continued for 30 days, being set for May 2, 1962.

"Protestants introduced evidence of certain irregularities affecting approximately 7,000 purported signers. The protestants then asked for a continuance and further continuance was denied by the Referee, whereupon protestants filed a motion for continuance with the Court which motion was set for oral argument on May 28, 1962. The Court denied any further continuances and directed that briefs be filed.

"The Court finds that the protestants have failed to make any substantial showing that there could be any probable defect in sufficient signatures to invalidate the petition in so far as the required number of signers is concerned and finds that the petition contains in excess of 135,472 valid signatures, the required number for its sufficiency." (A ii-iii; 373 Pac. (2d) 1017)

This succinct detailing of the extended period granted Petitioners to prove their case and their utter failure to produce any material evidence is verified at numerous points in the record.

34 O. S. 1961, § 8 requires the Secretary of State to transmit all his records relating to an initiative petition to the Supreme Court in event of an appeal from his decision. The transcript submitted thereunder to the Oklahoma Supreme Court shows hearings on ten dates. (Same will hereafter be referred to as "Record Testimony" or "RT.")

Said hearir were as follows, with their combined transcript containing 691 pages:

February 5, 1962	(RT. 3-144)
February 19, 1962	(RT. 146-184)
February 27, 1962	(RT. 195-311)
February 28, 1962	(RT. 312-364)

March 6, 1962	(RT. 365-375)
March 13, 1962	(RT. 376-417)
March 14, 1962	(RT. 418-560)
March 16, 1962	(RT. 561-590)
March 19, 1962	(RT. 591-687)
March 20, 1962	(RT. 688-691)

The fact that two hearings were held before the Referee of the Oklahoma Supreme Court is admitted by Protestants' Suggested Findings of Fact and Conclusions of Law.

> "That protestants and proponents appeared before me on April 2, 1962. Protestants requested a continuance of the hearing on their protest. The hearing was continued to May 2, 1962 at which time protestants and proponents again appeared before me * * *" (R. 96 or R. 100)

This is also confirmed by Petitioners' application filed with the court on May 9, 1962, in which their second numerical paragraph states in part:

> "The Referee, after hearing the above evidence continued the hearing to May 2, 1962, the day following the Primary Elections. At the hearing on May 2, 1962, the Appellants presented the following evidence to the Referee: * * *" (R. 9)

Also note the verified response of Respondents (R. 48-51) filed May 14, 1962, with attached affidavit and the subsequently filed affidavit of Ellis H. Wiet (R. 52-54).

Appellants omit in their statement of the case any reference to the order of the court dated May 29th (R. 62) in which the court stated:

"This matter coming on to be heard on application of protestants for a further continuance and an order directing the Referee to grant a further hearing, the court finds that the application was filed May 9, 1962, and set for oral argument on May 28, 1962. After due consideration of all the facts and circumstances the court finds protestants have not shown reasonable grounds nor reasonable diligence for a continuance. The court further finds that after a review of all the proceedings up to and including the date of the oral argument on the application for the order, the protestants have not shown any probability that a further check of the signatures on the petition would render said petition insufficient as to the number of signatures required to make the petition valid.

"It is therefore ordered by the court that the application for a continuance and direction to the Referee for a further hearing be denied.

"DONE BY ORDER AND DIRECTION OF THE SUPREME COURT IN CONFERENCE THIS 29 DAY OF MAY, 1962.

"Ben T. Williams, Chief Justice."

In addition Petitioners offered in evidence (RT. 11-12) an order (RT. 692-694) showing the Oklahoma Supreme Court had assumed jurisdiction in this matter as early as January 16th. The fact that the matter was still before the Supreme Court while the hearings were being held before the Secretary of State is confirmed by the Petitioners' counsel's statement (RT. 26):

"* * * this matter is still before the Supreme Court and we will be very prompt in making that known to the court."

Also note that 34 O. S. 1961, § 8 incorporates in one section the procedure relating to a protest, the hearing thereon before the Secretary of State and the appeal to the State Supreme Court.

Since Petitioners' sole contention is that they were given insufficient time to prepare for a hearing, the statement of one of Petitioners' counsel upon examination by another of Petitioners' counsel (RT. 68) which repudiated as unacceptable and time consuming the method ultimately adopted by Petitioners for checking the signatures is on its face proof of a dilatory motive.

Finally, note that the uncontradicted testimony of the IBM representative (RT. 105) that under the procedure first proposed by Petitioners (RT. 18) alphabetical listings by counties could be obtained by March 7th and that the largest county could be completed by March 2nd. Petitioners' Application of May 9 (R. 8-13) shows that Petitioners' counsel was absolutely correct in saying the previously repudiated checking procedure to which they switched was time consuming and unacceptable as not one of the state's seventy-seven counties had been checked even at that late date!

The testimony pertaining to checking signatures by IBM methods was subsequently called to the state court's attention at page 3 of Respondents' Motion filed March 28, 1962 (R. 29-30), page 2 of Respondents' Proposed Findings of Fact and Conclusions of Law (R. 94) and numerical paragraph 2 of Respondents' Response filed May 14, 1962. Incidentally, therein the court was reminded of the Petitioners' verified Application of January 31st: "that 30

working days is a reasonable time for said purpose," referring to sufficient time to check the signatures. Thus the state court had ample grounds for denying still further delay, holding the Respondents' evidence insufficient and declaring the petition sufficient.

ARGUMENT

Two questions are raised by Petitioners: First, that the Oklahoma Supreme Court denied them due process in intentionally and arbitrarily refusing to hear their evidence. Second, are these Petitioners entitled to this relief?

I.

WAS DUE PROCESS DENIED?

The statement of the case and the record in the State Supreme Court make it clear that Petitioners not only have had "their day in court" but had in excess of five months in which to present evidence as to the insufficiency of signatures on the petition.

It is true that the Oklahoma Supreme Court might better have allowed its Referee to file his Findings of Fact and Conclusions of Law after Suggested Findings of Fact and Conclusions of Law had been filed by both parties (R. 93-96) and (R. 97-105), but it is obvious from the initial statements in the court's opinion quoted *supra* (also Appendix ii) that the court had not lost contact with its full time Referee.

This record thus shows that after numerous hearings and many continuances Petitioners were able to introduce questionable evidence attacking only some 7,000 names, whereas the petition contained a surplus of 84,214 names.

A. **Procedure Prescribes Expeditious Hearing**

The applicable statute (34 O.S. 1961 § 8) provides an expeditious proceeding by limiting periods of protest, appeal and hearing to lesser times than in normal proceedings. Proponents of the initiative petition are given only ninety days to print, distribute, circulate, accumulate, tabulate, check and file the petitions. Only in the ten days thereafter may a protest be filed. Hearing thereon is in not less than ten days thereafter. An abandoned protest must be revived in five days. An appeal must be taken in ten days. A deficiency or error in the petition may be corrected in five days from the court's order. Also this statute provides:

> "If the Court be at the time adjourned the Chief Justice shall immediately convene the same for such hearing * * * whereupon said Secretary of State shall immediately transmit all papers and documents on file in his office relating to such petition to such Court."

In State Question No. 241, 102 P.2d 861, the Court sustained a dismissal of a protest after the protestants were afforded an opportunity to be heard and referred to 34 O.S. § 8 as follows:

> "The above section anticipates an expeditious protest conducted in good faith and with a view to a speedy settlement of the issues as to the sufficiency or insufficiency of the petition."

In re Initiative Petition No. 260; State Question No. 377, 298 P.2d 753, sustained the right of a referee to find

the petition valid when protestants failed to produce evidence after a continuance. Note that the total lapsed time from the filing of the petition to the referee's finding in that case was substantially less than in this case. There less than four months elapsed from the filing of the petition to the denial of the rehearing as against almost seven months in this instance.

It is important also to observe that the entire procedure before the Secretary of State and State Supreme Court are encompassed in one section of the statutes. This clearly indicates the procedure must be construed as a whole and not as two separate entities, even though protestants are given an opportunity to make a *de nova* record.

***B.* Test of Due Process Is Reasonableness**

The test of due process is essentially a test of reasonableness. (*Virginian Ry. Co.* v. *System Federation No. 40, et al.*, 300 U.S. 515, 558, 57 S. Ct. 592, 604, 81 L. Ed. 789; *Santiago* v. *People of Porto Rico*, 154 F.2d 811, 813; *Mueller* v. *Powell*, 203 F.2d 797, 800; *Swanson* v. *Bates*, 170 F.2d 648; *East Coast Lumber Terminal* v. *Town of Babylon*, 174 F.2d 106, 111; *Smolowe* v. *Delendo Corporation*, 46 F. Supp. 758, 765.)

And the test was stated in *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 246, 64 S. Ct. 599, 606, 88 L. Ed. 692:

> "What is due process in a procedure affecting property interests must be determined by taking into account the purpose of the procedure and its effect upon the rights asserted and all other circumstances which

may render the proceedings appropriate to the nature of the case * * *" (Cases cited).

This Honorable Court held in *Ex parte Wall*, 107 U.S. 265, 289, 2 S. Ct. 569, 589, 27 L. Ed. 552:

"* * * In all cases that kind of procedure is due process of law which is suitable and proper to the nature of the case and sanctioned by the established customs and usages of the court * * *."

And in *Fay* v. *People of the State of New York, infra*, at 332 U.S. 261, 295, 67 S. Ct. 1613, 1631, 92 L. Ed. 367:

"We adhere to this policy of self-restraint and will not use this great centralizing Amendment to standardize administration of justice and stagnate local variations in practice."

In *Cohen* v. *Beneficial Industrial Corporation*, 337 U.S. 541, 552, 69 S. Ct. 1221, 1228, 93 L. Ed. 1528, it was held that a state may set the terms on which it will permit litigation in its courts.

Brown v. *Hughes*, 136 F. Supp. 55, 63, held:

"The due process clause of the Fourteenth Amendment does not control forms of procedure in state courts or regulate practice therein."

Cooley's Constitutional Limitations, 8th Ed., p. 68, states:

"So far as the Federal Constitution is concerned, it is within the acknowledged power of the Legislature of a state to prescribe the evidence which shall be received and the effect of that evidence in the courts of its own government."

Certainly Petitioners had numerous opportunities to prepare and be heard. Likewise the prescribed procedure is reasonable.

II.
PETITIONERS' RIGHT TO CLAIM RELIEF

On September 26, 1962 (8 days after the notice herein of appeal to the United States Supreme Court), these same Petitioners and same counsel filed still another action (their fourth) relating to this same initiative petition. This one sought an alternative writ of mandamus (Respondents' Appendix hereto) from the Oklahoma Supreme Court directing the Oklahoma Election Board "to do and perform all acts and things required by law for submission to the qualified electors of the State of Oklahoma * * * that the general election be held throughout the State on November 6, 1962 or to return this writ on the 27th day of September, 1962 * * *." As a result of this action the Supreme Court *en banc* heard the proceedings on September 27th and 28th. An election was called for November 6th pursuant to the Petitioners' Application and the people affirmatively approved the petition by a 62,000 vote majority.

Conclusively the relief sought herein by Petitioners is *contra* to that requested and resulting from their fourth action.

Their second contention claims deprivation of due process and equal protection if tax moneys are expended for an election. Petitioners' subsequent action demanded the election be held. Thus the clearly inconsistent subsequent action can only be termed an abandonment of this

action by Petitioners and certainly has the practical effect of rendering the question moot! How can these parties continue to demand this Court require the Oklahoma Supreme Court to grant them further hearings to save the cost of an election when they have subsequently insisted that the election be held and the election has been held?

Certiorari Does Not Lie to Review Evidence Only, or for Delay and Sufficiency Thereof Must Be Viewed In Most Favorable Light to Trier of Facts.

The Supreme Court of the United States does not normally grant a writ merely to review evidence or inferences drawn from it (*General Talking Pictures Corporation* v. *Western Electric Co., Inc.*, 304 U.S. 175, 178, 58 S. Ct. 849, 851, 82 L. Ed. 1273, and cases cited therein).

Nor does the Supreme Court review technical questions tending to embarrass the progress and delay the final ending of the action, the merits of which are with the respondent (*Green County* v. *Thomas*, 211 U.S. 598, 29 S. Ct. 168, 53 L. Ed. 343.)

A final pertinent rule is that in determining the sufficiency of evidence to support findings of fact the evidence must be viewed in the light most favorable to factual conclusion reached by the trier of facts (*Mueller* v. *Powell*, 203 F.2d 797, 8th Circuit).

CONCLUSION

Petitioners had more than their "day in court." Having been heard at length orally and in writing under a fair and reasonable procedure they have not been denied due process or equal protection of the laws.

Having squeezed the ultimate in delay from the proceedings before the Secretary of State and the State Supreme Court, Petitioners reversed themselves and demanded an immediate election which was granted and held. Even if they are not thereby estopped to proceed herein, this action was thereby rendered moot. Thus these Petitioners do not have sufficient legal "standing" to assert an alleged denial of due process or equal protection.

It is, therefore, respectfully urged that Petitioners' Petition be denied so that the sovereign State of Oklahoma might proceed with reapportionment in accordance with its constitutional mandates and the will of its people so recently expressed.

NORMAN E. REYNOLDS, JR.,
REYNOLDS & RIDINGS,
2808 First National Building,
Oklahoma City 2, Oklahoma,
Attorneys for Respondent.

November, 1962.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
In Supreme Court
of Oklahoma
SEP 26 1962
ANDY PAYNE
Clerk

M. A. PRICE, JOHN M. RASBERRY and ROY GRIMES, personally and as the Directors of The Oklahomans for Local Government, an unincorporated association,

Plaintiffs,

-vs-

WILLIAM N. CHRISTIAN, Secretary of State of the State of Oklahoma; CARL K. BATES, MIKE PEDRICK and GEORGE STREETS, Chairman and Members, respectively, of the STATE BOARD OF PUBLIC AFFAIRS; and CLEE FITZGERALD, HERBERT F. HEWITT, and LOUIS R. GEISER, Chairman, Member and Secretary, respectively of the STATE ELECTION BOARD,

Defendants.

No. 40,282

APPLICATION FOR ASSUMPTION OF ORIGINAL JURISDICTION

Come now the abovenamed Plaintiffs and respectively apply to the Court to permit the filing of the attached Petition for Writ of Mandamaus and for the Court to assume original jurisdiction of the action therein pleaded for the following reasons:

[APPENDIX]

1. The matters and issues set forth in said Petition are public juris in that they affect and involve the vital interests of the State of Oklahoma and its citizens as stated in said Petition.

2. The action, cause for which is stated in said Petition, is of a nature which this Court heretofore has established as proper for adjudication by original action herein.

3. The said action relates to the submission of Initiative Petition No. 271 to a vote at the General Election to be held November 6, 1962, and, unless original jurisdiction is assumed by this Court, there is no means by which the defendants may be compelled to perform their lawful duties in submitting said Initiative Petition at said Election.

4. For additional reasons, reference is made to the Petition of Writ of Mandamus hereto attached.

ALLEN & WILLIAMS
JAS. A. RINEHART
HIRSH AND HARKIN
By LEON S. HIRSH

Attorneys for Defendants

[APPENDIX]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
In Supreme Court
of Oklahoma
SEP 26 1962
ANDY PAYNE
Clerk

M. A. PRICE, JOHN M. RASBERRY and ROY GRIMES, personally and as the Directors of The Oklahomans for Local Government, an unincorporated association,

Plaintiffs,

-vs-

WILLIAM N. CHRISTIAN, Secretary of State of the State of Oklahoma; CARL K. BATES, MIKE PEDRICK and GEORGE STREETS, Chairman and Members, respectively, of the STATE BOARD OF PUBLIC AFFAIRS; and CLEE FITZGERALD, HERBERT F. HEWITT, and LOUIS R. GEISER, Chairman, Member and Secretary, respectively of the STATE ELECTION BOARD,

Defendants.

No. 40282

ALTERNATIVE WRIT OF MANDAMUS

THE STATE OF OKLAHOMA TO: WILLIAM N. CHRISTIAN, Secretary of State of the State of Oklahoma; CARL K. BATES, MIKE PEDRICK and GEORGE STREETS, Chairman and Members, respectively, of the STATE BOARD OF PUBLIC AFFAIRS; and CLEE FITZGERALD, HERBERT F. HEWITT, and LOUIS R. GEISER, Chairman, Member and Secretary, respectively of the STATE ELECTION BOARD,

The abovenamed Plaintiffs have filed in the above entitled and numbered cause their duly verified Petition for Writ of Mandamus as follows:

[APPENDIX]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

M. A. PRICE, JOHN M. RASBERRY and ROY GRIMES, personally and as the Directors of The Oklahomans for Local Government, an unincorporated association,	)	
Plaintiffs,	)	
-vs-	)	No. 40282
WILLIAM N. CHRISTIAN, Secretary of State of the State of Oklahoma; CARL K. BATES, MIKE PEDRICK and GEORGE STREETS, Chairman and Members, respectively, of the STATE BOARD OF PUBLIC AFFAIRS; and CLEE FITZGERALD, HERBERT F. HEWITT, and LOUIS R. GEISER, Chairman, Member and Secretary, respectively of the STATE ELECTION BOARD,	)	
Defendants.	)	

PETITION FOR WRIT OF MANDAMUS

Come now the Plaintiffs abovenamed and for cause of action against the abovenamed Defendants allege and state:

I.

Plaintiffs are citizens, taxpayers and qualified electors of the State of Oklahoma and the Defendants, by law, are officers of the State charged with manatory and ministerial duties in respect of the herein after allegations of this Petition.

II.

On or about December 28, 1961, there was filed with the Defendant, William N. Christian, Secretary of State, an Initiative Petition designated as Initiative Petition No. 271, State Question No. 408, the sufficiency of which Initiative Petition, said Defendant sustained. Thereafter, the

ruling of said Defendant was appealed to this Court pursuant to law, said appeal being docketed in this Court in cause No. 40,043. Thereafter, on the 16th day of July, 1962, this Court entered its order and decree also sustaining said Initiative Petition, and on the 23rd day of July, 1962, denied the Petition for Rehearing therein, filed by the Plaintiffs.

Pending the aforesaid proceedings, the Attorney General of the State of Oklahoma did certify to the Defendant Secretary of State a ballot title, as provided by law, for said Initiative Petition, which said ballot title was appealed, as provided by law, to this Court on September 25, 1962. Concurrently with the filing therewith the last mentioned appeal is dismissed.

At the time of filing this Petition, the said Initiative Petition the same is required, by law, to be submitted for the approval or rejection by the qualified electors of the State at the General Election to be held on November 6, 1962, and there presently is sufficient time for full compliance with all lawful requirements for such submission if the Defendants perform the duties required of them by law for such submission.

III.

There has been no Special Election called by the Governor of the State of Oklahoma for the submission of said Initiative Petition to the qualified electors prior to said General Election, and the Defendants have mandatory duties prescribed by law to effect the submission of said Initiative Petition at the aforesaid General Election.

IV.

Plaintiffs are informed and believe, and therefore allege the fact to be, that the said Defendants, unless ordered by the Court as herein prayed, will delay, neglect and refuse to perform their lawful duties in respect to the submission of said Initiative Petition to the qualified

electors of the State, as provided by law, at said General Election.

V.

In all of the foregoing, Plaintiffs have no plain, speedy or adequate remedy at law or in equity other than the relief herein prayed.

WHEREFORE, Plaintiffs pray an order of this Court requiring and commanding the said Defendants to do and perform all acts and things required by law to the end that said Initiative Petition be submitted to approval or rejection by the qualified electors of the State at the General Election to be held on November 6, 1962.

M. A. PRICE, JOHN M. RASBERRY
and J. R. HUTCHENS
ALLEN & WILLIAMS
JAS. A. RINEHART
HIRSH and HARKIN
By /s/ LEON S. HIRSH
Attorneys for Plaintiffs

STATE OF OKLAHOMA)
) SS.
COUNTY OF OKLAHOMA)

M. A. Price, being first duly sworn, states that he is one of the Plaintiffs in the above Petition, that he has read the same and knows the facts therein stated, and that the same are true except those stated on information and belief, which facts he truly believes to be true.

/s/ M. A. PRICE

Subscribed and sworn to before me this 25th day of September, 1962.

/s/ DOROTHY J. SPIRA
Notary Public

(Seal)

My Commission expires July 27, 1966.

And the Court having considered said Petition and being fully advised in the premises,

IT IS, BY THE COURT, ORDERED AND DECREED, that you, the said defendants forthwith shall do and perfrom all acts and things required by law for submission to the qualified electors of the State of Oklahoma of the approval or rejection of Initiative Petition No. 271, State Question No. 408, at the General Election to be held throughout the State on November 6, 1962, or to return this Writ to this Court in the Supreme Court Conference Room on the 27th day of September, 1962, at the hour of 1:30 o'clock P.M. with your answer showing cause, if any you have, why a Peremptory Writ of Mandamus in the foregoing should not be allowed as prayed by the Plaintiffs.

HEREOF FAIL NOT UNDER PENALTY OF LAW.

Dated this 26th day of September, 1962.

/s/ BEN T. WILLIAMS
Chief Justice of the Supreme Court of Oklahoma.

Alternative Writ of Mandamus allowed this Sept. 26, 1962.

/s/ BEN T. WILLIAMS
Chief Justice

ATTEST:

/s/ ANDY PAYNE
Clerk of Supreme Court of Oklahoma.

(Seal)